No. 00-798

IN THE

# Supreme Court of the United States

GREENVILLE WOMEN'S CLINIC, *et al.*,

*Petitioners,*

*v.*

DOUGLAS E. BRYANT, in his official capacity as Commissioner of the South Carolina Department of Health and Environmental Control, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## Brief In Opposition For Respondents Attorney General Of The State Of South Carolina And The Commissioner Of The South Carolina Department Of Health And Environmental Control


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## QUESTIONS PRESENTED

1. In light of the fact that one of the Petitioners admitted that it already complied with almost all of the Regulation, did the Fourth Circuit err in holding that Regulation 61-12 — which largely tracks national standards for abortion services that the Petitioners admit represent good practice — does not violate the Due Process Clause of the United States Constitution?

2. Did the Fourth Circuit err in holding that Regulation 61-12 does not violate the Equal Protection Clause of the United States Constitution when the Regulation, promulgated pursuant to an unchallenged legislative mandate, largely tracts national standards for abortion services that the Petitioners admit represent good practice?

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## STATEMENT OF THE CASE

In 1995 the South Carolina Legislature enacted S.C. Code Ann. § 44-41-75. This legislation required the South Carolina Department of Health and Environmental Control ("DHEC") to license any facility "in which any second trimester or five or more first trimester abortions are performed in a month." S.C. Code Ann. § 44-41-75(A). This enabling legislation mandated that DHEC re-write Regulation 61-12, which heretofore had governed only second trimester abortions. J.A. 867-68 and 1150-51.[1] The Legislature required DHEC to "promulgate regulations concerning sanitation, housekeeping, maintenance, staff qualifications, emergency equipment, and procedures to provide emergency care, medical records and reports, laboratory, procedure and recovery rooms, physical plant, quality assurance, infection control, and information on and access to patient follow-up care necessary to carry out the purposes of this section." *Id.* § 44-41-75(B). The Petitioners have not challenged this enabling legislation. They seek only to enjoin the regulations the legislation mandated. *See generally* J.A. 23-44 (Petitioners' Complaint).

In drafting Regulation 61-12 DHEC relied upon, among other things, several national standards governing abortion procedure.[2] These standards included *Standards for*

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1. References to the Joint Appendix filed with the Fourth Circuit will be cited as "J.A. __." References to the Appendix to Petition for Writ of Certiorari (hereinafter "Appendix") will be cited as "A. __."

2. In addition to these standards, DHEC reviewed abortion regulations from Tennessee, North Carolina, Georgia, and Florida. J.A. 1174.

*Obstetrics-Gynecologic Standards, 7th Edition* (1995) of the American College of Obstetrics and Gynecology (hereinafter referred to as "*ACOG Standards*"), *Standards for Abortion Care* of the National Abortion Federation (hereinafter referred to as "*NAF Standards*"), and Planned Parenthood's Manual of Medical Standards and Guidelines (hereinafter referred to as "Planned Parenthood Manual"). J.A. 1153. *See also* J.A. 2228-38 (*ACOG* Standards), 2454-68 (Planned Parenthood Manual), and 2496-2520 (*NAF Standards*).[3] As a result of DHEC's reviewing and relying upon both *ACOG Standards* and *NAF Standards*, many provisions of Regulation 61-12 are similar to these national standards. *See* A. 20-21 (Fourth Circuit's comparison of Regulation 61-12 to national abortion standards). *See also* J.A. 1000-08 (testimony of Dr. Grimes concerning provisions of *ACOG* and *NAF Standards* and their similarity with Regulation 61-12); J.A. 1171-74 (testimony of George Moore concerning similarity of some 61-12 provisions to ACOG and NAF Guidelines).

According to Dr. David Grimes, an ACOG member and one of the Petitioners' expert witnesses, *ACOG Standards* "provide our best current assessment as to what is appropriate care." A. 22, 234. Dr. Terry Buffkin, one of the two principals of the Greenville Women's Clinic, testified that ACOG is "an organization of gynecologists throughout the country to maybe provide a consensus, a continuity of care, so that the care here in South Carolina would be similar to the care in New York, so there would be consensus throughout the country on the care that women receive." J.A. 331. Dr. William Campbell, Dr. Buffkin's partner, agreed the

3. Excerpts of these standards are also set forth in the Appendix. *See* A. 261-69 (*ACOG Standards*), A. 288-89 (Planned Parenthood Manual), and A. 292-99 (*NAF Standards*).

*ACOG Guidelines* "are commonly used and relied upon by obstetricians and gynecologists nationwide to determine the standards and the appropriate level of care for their patients." J.A. 689. Respecting the *NAF Standards*, Dr. Grimes testified they are a "distillate of extensive experience by highly skilled and experienced providers." A. 22.

Following a bench trial the District Court held that although DHEC "clearly had the right" to promulgate Regulation 61-12, "[w]hat it did wrong was go too far." A. 103. Thus, the District Court held Regulation 61-12 violated both the Due Process and the Equal Protection Clauses of the United States Constitution. *Id.* The Fourth Circuit Court of Appeals reversed, finding

> (1) the Regulation serves a valid state interest and is little more than a codification of national medical- and abortion-association recommendations designed to ensure the health and appropriate care of women seeking abortions; (2) the Regulation does not "strike at the [abortion] right itself," . . . ; (3) the increased costs of abortions caused by implementation of the Regulation, while speculative, are even yet modest and have not been shown to burden the ability of a woman to make the decision to have an abortion; and (4) abortion clinics may rationally be regulated as a class while other clinics or medical practices are not.

A. 4 (citation omitted). The Fourth Circuit denied the Petitioners' request for rehearing and rehearing *en banc*. A. 204. This petition for writ of certiorari followed.

## REASONS FOR DENYING THE WRIT

## CERTIORARI SHOULD BE DENIED BECAUSE THE FOURTH CIRCUIT PROPERLY HELD THAT THE REGULATION COMPORTS WITH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

### I. THE RECORD SUPPORTS THE FOURTH CIRCUIT'S HOLDING THAT THE REGULATION DOES NOT IMPOSE AN UNDUE BURDEN ON WOMEN SEEKING ABORTIONS IN SOUTH CAROLINA.

#### A. The Fourth's Circuit Properly Exercised its Role as Expositor of the Law.

The Petitioners' first argument for granting the writ is the Fourth's Circuit purported "blatant disregard of the factual findings of the District Court . . . . " Petition for Certiorari (hereinafter "Pet.") at 15 (citing Rule 52(a), FRCP). This argument fails to acknowledge, however, that the District Court's "findings" upon which Petitioners rely are questions of law, or at most, mixed questions of law and fact. The District Court itself realized this point, stating in its opinion that

> [t]his case involves so much detail . . . that occasionally a full presentation of the issues blurs the distinction between findings of fact and conclusions of law. Accordingly, the court notes that to the extent any of the findings of fact constitute conclusions of law, they are adopted as

> such, and to the extent any conclusions of law constitute findings of fact, they too are adopted as such.

A. 103, N.1.

This Court has recognized that plenary review is appropriate where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case." *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). In such circumstances the Court "has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." 474 U.S. at 114. Issues concerning whether Regulation 61-12 is "medically justified", whether it promotes a valid state interest, whether incidental cost increases or delays in service impose a constitutionally-significant obstacle, and ultimately, whether those alleged obstacles impose an undue burden on women seeking an abortion, present such circumstances. The examples that the Petitioners use to illustrate the Fourth Circuit's purported "rampant substitution of its own factual theories from the District Court's findings" likewise present such circumstances.

### 1. Comparison of Regulation 61-12 with Nationally Accepted Abortion Standards.

The Petitioners first take issue with the Fourth Circuit's finding that the Regulation "largely tracks" national medical standards, in contrast to the District Court's finding that the Regulation "far exceed[s]" these standards' requirements. *See* Pet. at 12. The Fourth Circuit's comparison of the Regulation to the plain language of these national standards

is nothing new for appellate courts. Indeed, such review is typical, as neither the District Court's nor the Fourth Circuit's own comparison of the Regulation to these national standards represents a "finding of fact." To the contrary, review of the Regulation to the plain and undisputed language of these national standards presents questions of law.

Petitioners' core complaint here is the Fourth Circuit's finding that South Carolina properly relied upon these national standards in promulgating the Regulation. In 1995 the South Carolina Legislature gave DHEC explicit instructions to rewrite Regulation 61-12 so that it would cover not only facilities in which second trimester abortions were performed, but also any facility in which "five or more first trimester abortions are performed in a month." S.C. Code Ann. § 44-41-75(A). The legislature further charged DHEC to cover the following specific areas: sanitation, housekeeping, maintenance, staff qualifications, emergency equipment, procedures to provide emergency care, medical records and reports, laboratory, procedure and recovery rooms, physical plant, quality assurance, infection control, and information on and access to patient follow up care. *Id.* § 44-41-75(B). The Petitioners have not challenged this legislative mandate, and they do not challenge the sufficiency of the national standards upon which the Regulation is based. *See* A. 22. DHEC's main offense, according to the Petitioners, was requiring that abortion facilities follow these guidelines. The legislative mandate, however, provides that DHEC must promulgate *regulations*, and not merely recommendations. Having failed to challenge the enabling statute, Petitioners are now precluded from arguing that adoption of regulations based upon these national standards violates the Constitution. Moreover, Petitioners cannot complain that DHEC failed to

assess whether any abortion facility regulations were needed. The unchallenged enabling legislation required DHEC to promulgate such regulations.

### 2. Findings Regarding Alleged Constitutional Obstacles.

The Petitioners second and third examples of the Fourth Circuit's "disregard" of the District Court' findings both relate to whether or not Regulation 61-12 imposes constitutionally-significant barriers to women seeking abortions in South Carolina.[4] Both of these conclusions, however, present paradigm examples of the type of circumstances presented in *Miller v. Fenton*, in which this Court expressed its reluctance to "strip a federal appellate court of its primary function as an expositor of law." 474 U.S. at 114. Moreover, as the record reveals, the Fourth Circuit properly held there was no proof that the Regulation will impose an undue burden on women seeking abortions in South Carolina.

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4. In the second example Petitioners take issue with the Fourth Circuit's conclusion that "there is no evidence that women from the Beaufort area cannot drive 70 miles to Charleston to obtain an abortion", Pet. at 15 (*citing* A. 15 and A. 26); while in their third example Petitioner's argue that the Fourth Circuit's conclusion that "there is no evidence that the ability of any woman to obtain an abortion or to decide to obtain an abortion would be frustrated by 'the cost imposed by the Regulation' " "directly conflicts with the District Court's finding that the cost and other burdens imposed by the Regulation 'will prevent a significant number of women from obtaining an abortion or, at a minimum, delay them from obtaining the abortion, both of which carry increased risk to the health of women.' " Pet. at 15 (*citing* A. 27, 148 and 152).

Based upon the testimony of Dr. Stanley Henshaw, the District Court concluded that the Regulation would cause unconstitutional burdens resulting from increased costs and increased travel. *See* A. 139-40. Dr. Henshaw's testimony, however, provided no support to these conclusions. First, Dr. Henshaw admitted that he was not asked to evaluate the specific effect of Regulation 61-12 on the availability of abortions in South Carolina. J.A. 1560. Second, Dr. Henshaw testified only in "general ways" concerning his opinion regarding the effect a decrease in the number of abortion providers will have on the availability of abortion services. J.A. 1582. Indeed, this opinion was based in large part upon a study done in South Dakota where one of the only two abortion providers in that state went out of business. J.A. 1580-82. This study has no relationship to South Carolina, which has as few as nine abortion providers, and as many as 14 providers. In 1996 nine facilities in South Carolina, exclusive of hospitals, reported to DHEC that they performed abortions. These facilities are located geographically throughout the state in Beaufort, Charleston, Richland (two), Greenville (two), Darlington, and Marion counties. J.A. 1157. Dr. Stanley Henshaw, an expert witness for the Petitioners, testified that in 1996 there were fourteen abortion facilities in South Carolina. J.A. 1567.

Third, with regard to his testimony concerning the effect that distance plays on the availability of an abortion, Dr. Henshaw did not know how long a travel distance needed to be in order to have an effect. Instead, he stated "I would think that it's a continuum. The more the distance the more the barrier." J.A. 1574. Moreover, Dr. Henshaw had no knowledge of the distance that women in South Carolina

would have to travel as a result of Regulation 61-12, or indeed, how far women in South Carolina are traveling pre-Regulation 61-12 to obtain an abortion.

Dr. Henshaw did testify that a $250 increase in an abortion would affect 25% of poor women seeking an abortion. J.A. 1597. He also testified that a $25 increase would affect 1 to 2% of poor women. J.A. 1597-98. There was no testimony offered in the record, however, concerning the number of poor women — indeed, the number of any women — who will be affected by the cost increases the Petitioners claim they will suffer. Moreover, there was no testimony concerning the cost increases that other abortion providers in the State will incur. A. 15-16. In short, Dr. Henshaw's testimony was speculative, at best, and the Fourth Circuit properly held that there was no evidence that the ability of any woman to obtain an abortion would be frustrated by the costs imposed by the Regulation. A. 27.

### B. The Record Shows that Regulation 61-12 is Medically Reasonable and not Burdensome.

Dr. Buffkin summed up the Petitioners' position concerning Regulation 61-12 when he testified there was not "a single word, a single sentence that would do anything to improve the healthcare of women seeking an abortion in South Carolina." J.A. 346. However, both Dr. Buffkin and his partner, Dr. Campbell, admitted that they already complied with virtually all of Regulation 61-12, J.A. 359 and 699, and the reason they complied with those provisions found in the Regulation is because those provisions constitute good practice. J.A. 359-360 and 700. Indeed, Regulation 61-12 was drafted and enacted to serve the valid purpose of promoting the State's legitimate interest from the outset of

pregnancy in protecting the health and welfare of women. To accomplish this goal DHEC turned to the best standards available. Indeed, these standards were created to "serve as a useful resource for local and state agencies charged with safeguarding the public's health." A. 22 (quoting *NAF Standards*). The regulation is therefore reasonably related to the State's legitimate interest in ensuring that women have abortions performed under safe conditions. *See* A. 22.

This Regulation does not look to strike at a woman's right to choose whether to have an abortion; rather, these regulations look to protect the health of women who seek abortions by ensuring, among many other things, that women will be offered medical tests to determine whether they have venereal diseases which could complicate abortions and cause other health problems; that abortion providers are housed in facilities which are properly equipped to handle the complications associated with abortions; and that women are treated by medical providers who possess the skills required to perform the abortion procedure safely.

It is true that Petitioners presented proof that these safeguards would cause an incidental increase in the cost of abortions. The Court's abortion jurisprudence teaches, however, that an increase in costs does not constitute an undue burden *per se* upon a woman's right to choose to have an abortion. *See Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992). *See also id.* at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."). Indeed, in *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476, 490 (1983), the Court held that increased costs of $19.40 for the compilation of a pathology report for abortions did "not significantly

burden . . . [the] pregnant woman's decision in choosing whether to have an abortion," finding that the "small cost [was] clearly . . . justified" in comparison with the "substantial benefits that the pathologist's examination [could] have."

The Constitution does not mandate that an abortion be had at a certain price or that all women be able to afford an abortion. *See Harris v. McRae*, 448 U.S. 297, 316 (1980). Therefore, while an increase in the price might *arguendo* prevent additional women from being able to afford an abortion, this price increase, by itself, does not rise to constitutional significance. This is especially true in this case, where there is no proof regarding the number of women who will be affected by the price increases that the Petitioners claim Regulation 61-12 will cause.

The Petitioners nevertheless argue that increased prices will impose an undue burden on a woman's right to have a abortion. First, Petitioners argue broadly that the increased costs may cause abortion providers to stop performing abortions. *See* Pet. at 8. However, the only provider who testified he *might* be forced to cease performing abortions was Dr. Lynn. J.A. 509. But Dr. Lynn's absence will not cause a substantial obstacle for women who wish to obtain abortion services. In 1997 Dr. Lynn performed a little over 11% of the abortions in South Carolina. There are, or will soon be, abortion clinics in the two cities where Dr. Lynn's clinics are located, in Beaufort and Greenville. Planned Parenthood is opening a clinic in Beaufort, and even offered Dr. Lynn a job at the facility. J.A. 1716-1720, 1741-1744.[5]

5. As the Planned Parenthood of South Carolina Website states, Planned Parenthood of South Carolina "will begin offering [abortion services] at the new Beaufort location soon." *http://www/.plannedparenthoodofsc.org/medical.htm.*

The Greenville Women's Clinic is already located in Greenville. Furthermore, there are abortion providers located strategically across South Carolina: the Upstate of South Carolina (Greenville Women's Clinic), the Midlands (Planned Parenthood, Westside Woman's Clinic and Carolina Woman's Clinic in Richland County), the Pee Dee area (Finger Clinic in Marion), and the coast (Charleston Women's Clinic). *See* J.A. 2137. Simply put, Petitioners have not shown that even Dr. Lynn's going out of business will present a substantial obstacle for women who want an abortion.

Second, and as discussed above, Petitioners point to Dr. Henshaw's testimony. However, as discussed *supra.* at pp. 8-9, Dr. Henshaw's testimony simply does not demonstrate what burdens, if any, that Regulation 61-12 may impose on women seeking abortions in South Carolina.

Regulation 61-12 is medically appropriate, designed to promote the health and welfare of women seeking abortions, and does not impose a "substantial obstacle" to women exercising their right to obtain an abortion. The Fourth Circuit correctly held that Regulation 61-12 passes *Casey*'s undue burden test.

### C. The Fourth Circuit's Holding Was Based upon this Court's Undue Burden Standard Set Forth in *Planned Parenthood v. Casey.*

The Fourth Circuit examined Regulation 61-12 under both the "no set of circumstances test" articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987), and the "large fraction test" articulated in *Casey*, 505 U.S. at 895. While the Panel did rule that Regulation 61-12 is constitutional under the *Salerno* test, it also held the

regulation valid under the *Casey* standard. A. 15. Indeed, the majority of the Fourth Circuit's opinion dealt with its undue burden analysis. *See* A. 15-29. Because the Fourth Circuit found that Regulation 61-12 is constitutional under both tests, Petitioners cannot validly argue that its decision conflicts with Supreme Court precedent regarding the appropriate standard of review in a facial challenge to an abortion regulation. *See, e.g., Planned Parenthood of Blue Ridge v. Camblos*, 155 F.3d 352, 381, n.14 (4th Cir. 1998) (noting that although "the circuits are split over whether the Salerno standard for facial challenges applies in the abortion context after Casey", "it is unnecessary for us to resolve this question in this case, because Petitioners cannot meet either the Salerno standard or the Casey standard.").

## II. THE FOURTH CIRCUIT CORRECTLY HELD THAT REGULATION 61-12 DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The Panel appropriately applied the rational basis test to the Petitioners' equal protection claims. *See* A. 31-32. Strict scrutiny is exacted only when a government regulation impinges on a fundamental right, *see, e.g. Zablocki v. Redhail*, 434 U.S. 374 (1978) (law impinging on right to marry subject to strict scrutiny), or when the regulation discriminates on the basis of a suspect class such as race or national origin. *See, e.g. Loving v. Virginia*, 388 U.S. 1 (1967) (race-based classification subject to strict scrutiny).

The doctors and clinics subject to Regulation 61-12 do not form a suspect class. They do not have an immutable characteristic, have not traditionally been discriminated against, and have not lacked access to the political process. *See, e.g. Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313-314 (1976). The physicians affected by

this Regulation also do not have a fundamental liberty interest in performing abortions free from government regulation. *See Birth Control Ctr., Inc. v. Reizen*, 743 F.2d 352, 358 (6th Cir. 1984) (finding doctors' equal protection rights were not violated by states' regulation of free standing surgical outpatient facilities while not regulating private physician's offices where abortions were also performed, where Petitioner doctors raised their own equal protection rights and not those of their patients). Moreover, the record demonstrated, and the Fourth Circuit found, *see* A. 15-29, that Regulation 61-12 does not impose a substantial obstacle to a large fraction of women seeking abortions in South Carolina.

Because this regulation does not impinge on a fundamental right, and because it does not involve a suspect classification, the rational basis test is the appropriate standard of review. *See, e.g. F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 312 (1993). Regulation 61-12 meets this standard because it was rational and reasonable to impose Regulation 61-12 only on providers of five or more first trimester abortions per month. First, the legislature instructed DHEC to draft regulations *only* for this class of doctors. *See* S.C. Code Ann. § 44-41-75. Therefore, DHEC had *no option* but to impose regulations on these doctors and clinics, as they were not instructed to promulgate regulations for other clinics. Again, Petitioners have not challenged this enabling statute. Furthermore, line drawing of the type found in S.C. Code Ann. § 44-41-75 is typically a legislative function and presumed valid. *See Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. at 314.

Moreover, in applying the rational basis standard, the Fourth Circuit correctly concluded that an abortion procedure

is a unique act, and as a result, correctly found that South Carolina had a rational basis for regulating abortion clinics while not regulating other health care facilitates. A. 32-34. Indeed, in *Casey* the Court made it clear that an abortion procedure is much more than a medical procedure. It stated:

> Abortion is an act fraught with consequences for others. For a woman who must live with the implication of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and depending on one's beliefs, for the life or potential life that is aborted.

505 U.S. at 852.

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); *Reed v. Reed*, 404 U.S. 71, 76 (1971). The Constitution, however, does not forbid all forms of classification. In this case, all providers of five or more abortions per month are treated the same. If a statutory classification is related to the object of the legislation, there is no equal protection violation. *See, e.g. Reed v. Reed*, 404 U.S. 71 (1971). Moreover, South Carolina has a legitimate interest in "safeguarding health, and maintaining medical standards, . . . and protecting potential life." *Roe v. Wade*, 410 U.S. 113, 154 (1973). Therefore, South Carolina may treat abortion, because of its unique nature, differently than other medical procedures. *See H. L. v. Matheson*, 450 U.S. 398, 412 (1981) (noting

difference between abortion procedure and medical procedures associated with full term pregnancies); *Bellotti v. Baird*, 428 U.S. 132, 148-49 (1976) ("Not all distinction between abortion and other procedures is forbidden."); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 67 (1976) (no constitutional defect to require consent from patients before an abortion while not requiring consent for other types of surgery). The Fourth Circuit's ruling comports with this Court's decisions.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Certiorari.

Respectfully submitted,

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